RECORD AND BRIEFS

No. 22O141, Original

Supreme Court, U.S.
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SUPREME COURT, U.S.

In The
Supreme Court Of The United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and STATE OF COLORADO,

Defendants.

On Motion for Leave to File Complaint

TEXAS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF IN RESPONSE TO NEW MEXICO'S SUPPLEMENTAL BRIEF

STUART L. SOMACH, ESQ.*
ANDREW M. HITCHINGS, ESQ.
ROBERT B. HOFFMAN, ESQ.
SOMACH SIMMONS & DUNN, PC
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
Telephone: 916-446-7979
ssomach@somachlaw.com
* *Counsel of Record*
January 2014

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TEXAS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

The State of Texas hereby respectfully moves for leave to file the attached Supplemental Brief in response to New Mexico's Supplemental Brief.

In support of its motion, Texas asserts as follows:

1. No Supreme Court rule specifically references supplemental briefs in original jurisdiction actions, but in other actions supplemental briefs may be filed to call attention to an "intervening matter not available at the time of the party's last filing" and such a brief "shall be

restricted to new matter." *See* Supreme Court Rule 15.8. This response to New Mexico's supplemental brief is warranted because while New Mexico's brief is largely repetitive of arguments made in its initial opposition brief, it may also contain new matter submitted after Texas' filed its Reply Brief. Additionally, the Court's consideration of Texas' pending Motion for Leave to File Complaint may benefit from Texas' response to the points raised in New Mexico's supplemental brief.[1]

2. Allowing Texas to file this Supplemental Brief will not delay the Court's consideration of Texas' Motion for Leave to File Complaint.

Respectfully submitted,

STUART L. SOMACH, ESQ.*
ANDREW M. HITCHINGS, ESQ.
ROBERT B. HOFFMAN, ESQ.
SOMACH SIMMONS & DUNN, PC
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
Telephone: 916-446-7979
ssomach@somachlaw.com
**Counsel of Record*

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[1] To the extent the Court treats New Mexico's Motion for Leave to File Supplemental Brief as a motion pursuant to Supreme Court Rule 21, Texas requests that the Court consider this brief as a response to such a motion pursuant to Supreme Court Rule 21.4.

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TEXAS' SUPPLEMENTAL BRIEF IN RESPONSE TO NEW MEXICO'S SUPPLEMENTAL BRIEF

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SUMMARY OF ARGUMENT

New Mexico does not directly respond to specific assertions or any new matters raised in the Brief of the United States as Amicus Curiae (U.S. Br.). Instead, New Mexico exploits this second opportunity for briefing to simply recast its prior arguments in a different light. In particular, New Mexico realleges, as it did in its initial Brief in Opposition (N.M. Opp. Br.), that there is an alternative forum to resolve the issues presented in Texas' Complaint. (N.M. Opp. Br. at 2-3, 22-31.) That position remains incorrect. Only this Court can vindicate Texas' interstate Compact claims against New Mexico and enforce the provisions of the Rio Grande Compact. New Mexico attempts to trivialize the nature of the dispute between it and Texas by asserting that the dispute merely involves a Reclamation contract to which neither New Mexico nor Texas are parties. In fact, the Complaint that Texas seeks to file is one that raises serious and significant issues related to New Mexico's breach of its Rio Grande Compact obligations.

ARGUMENT

I. New Mexico Lacks Grounds to File a Supplemental Brief

The Supreme Court Rules do not explicitly provide an opportunity for parties to file supplemental briefs in original jurisdiction actions. Supreme Court Rule 15.8, applicable to petitions for

certiorari, however, provides that "[a]ny party may file a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing" and such a brief "shall be restricted to new matter . . . ." Rule 15.8.

For the most part New Mexico's Supplemental Brief (N.M. Supp. Br.) is merely a second attempt at opposing Texas' Motion for Leave to File Complaint. The first four pages of New Mexico's brief do not even purport to have anything to do with the United States' amicus brief and instead directly address Texas' underlying motion. The balance of New Mexico's brief, while nominally in response to the United States' brief, in fact, presents arguments on the merits of Texas' Motion for Leave to File Complaint that New Mexico previously raised or could have raised in its original opposition brief.[1] No Court rule provides the parties an occasion to reargue positions or raise matters that could have been briefed at the time of original briefing. New Mexico attempts to overcome this limitation by denominating its Supplemental Brief as a response

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[1] In contrast, the State of Colorado's Supplemental Brief in Opposition directly addresses issues apparently found in the United States' amicus brief. However, none of Colorado's assertions are relevant to the question of whether this Court should grant Texas' Motion for Leave to File Complaint. Accordingly, Colorado's supplemental brief does not warrant a response.

to the United States' amicus brief. In fact, New Mexico merely reargues the positions it raised or should have raised in its original opposition brief. Accordingly, the Court should not consider New Mexico's supplemental brief.

II. The Interstate Compact Interpretation and Enforcement Issues Tendered by Texas Cannot Be Resolved in the District Courts or Any Other Alternative Forum

In its current brief, New Mexico attempts to redefine Texas' Complaint as one that involves a simple contract issue involving the El Paso County Water Improvement District No. 1 (EPCWID) and the United States, as opposed to the actual and immediate interstate Compact dispute between New Mexico and Texas. The Texas Complaint, however, focuses on Rio Grande Compact violations, and not violations of Reclamation law or provisions of a contract to which neither Texas nor New Mexico is a party.

Texas' sovereign rights to waters of the Rio Grande are provided for by the Rio Grande Compact, and are not defined by a contract to which it is not a party. Water apportioned by the Compact to Texas is allocated, in Texas, pursuant to Texas state law and, in some cases, Federal law, to parties in Texas. In fact, parties other than EPCWID receive allocations of water apportioned to Texas by the Compact. One example of this, and completely ignored by New Mexico, is amicus Hudspeth County

Conservation District and Reclamation District No. 1 (Hudspeth). [2] Various other Certificates of Adjudication allocate to entities within Texas the waters of the Rio Grande that have been apportioned to Texas by the Compact.[3] The United States has also pointed out that Texas' claim to waters of the Rio Grande is broader than EPCWID's interest. U.S. Br. at 19.

Accepting New Mexico's argument would lead to a conclusion that somehow Texas' sovereign rights are coextensive with the Rio Grande Reclamation Project and related contracts to which it is not even a party. However, while the Project is clearly relevant to the Compact, it hardly defines Texas' rights. If it did, then the 1938 Compact would have been superfluous, and the 1906 authorization of the Rio Grande Project would have alone been sufficient to define Texas' rights on the Rio Grande.

New Mexico asserts this faulty premise for the purpose of rearguing that alternative fora exist to resolve the dispute raised by Texas' Complaint. That position remains incorrect. *See* Reply Brief of the State of Texas at 9-12; U.S. Br. at 10-12, 17-21. In

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[2] *See* Amicus Brief of Hudspeth at 8-10 (explaining Hudspeth's right to divert 27,000 acre-feet per year from the Rio Grande as recognized and set forth in Certificate of Adjudication No. 23-5944, and Hudspeth's authorization to use up to 151,902 acre-feet per year of Rio Grande Project water pursuant to its Warren Act Contract with the United States).

[3] *See, e.g.*, Appendix to EPCWID's amicus brief, which contains its Certificate of Adjudication No. 23-5940.

addition, and contrary to New Mexico's contention, this Court's denial of jurisdiction in this case would not "promote the proper functioning of the federal judicial system" (N.M. Opp. Br. at 1) but would simply leave Texas without a forum in which to resolve the serious Compact claims raised in its Complaint.

Even if New Mexico's faulty premise were correct, the district courts would still not be an alternative forum for resolution of Texas' dispute with New Mexico. Relying on 43 U.S.C. § 390uu, New Mexico argues that EPCWID could bring a direct suit against the United States in district court seeking to enforce its 1938 contract.[4] But litigation initiated by EPCWID, a local government entity, does not aid the State of Texas, at all. Texas is not a party to EPCWID's 1938 contract with the United States and, more importantly, Texas here seeks relief pursuant to its rights under the Compact and not pursuant to EPCWID's 1938 or any other contract with Reclamation. Thus, the limited waiver of sovereign immunity in 390uu would not apply to Texas' claim.[5]

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[4] Whether the limited waiver of sovereign immunity in 390uu is broad enough to cover such a suit is debatable at best. *See Orff v. United States*, 545 U.S. 596, 602 (2005) ("[Section 390uu] does not permit a plaintiff to sue the United States alone.").

[5] New Mexico also asserts that the existence of a compact claim does not require the exercise of original jurisdiction, because federal district courts may interpret interstate compacts. N.M. Supp. Br. at 9-10. None of the cases cited by New Mexico, in

Footnote continued on following page.

Finally, and perhaps most importantly, Texas cannot sue New Mexico in any forum other than this Court. United States Constitution, Article III, Section 2, Clause 2; *California v. Arizona*, 440 U.S. 59, 61-63 (1979) (citing 28 U.S.C. § 1251(a)(1)); *see also Mississippi v. Louisiana*, 506 U.S. 73, 77-78 (1992) ("the description of our jurisdiction as 'exclusive' necessarily denies jurisdiction of such cases to any other federal court"). By permitting unlimited groundwater pumping below Elephant Butte Reservoir in New Mexico in derogation of its Compact obligations, it is the State of New Mexico, and not the United States, Elephant Butte Irrigation District or some other entity that has caused and continues to cause damage to Texas. Far from allowing the "proper functioning of the federal jurisdictional system," a failure by this Court to exercise its jurisdiction will not resolve this dispute but, at best, will foment extensive and inappropriate collateral litigation and exacerbate the real, existing and ongoing dispute between Texas and New Mexico.

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which lower courts interpreted legal issues related to interstate compacts, involve controversies between states. As a consequence, none of those cases are, at all, relevant to the instant situation.

CONCLUSION

Based upon the foregoing, New Mexico's supplemental brief should be disregarded, and the State of Texas' Motion for Leave to File Complaint should be granted.

Respectfully submitted,

STUART L. SOMACH, ESQ.*
ANDREW M. HITCHINGS, ESQ.
ROBERT B. HOFFMAN, ESQ.
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